

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 14

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

ROBERT FORTIER, ET AL.

ON WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1951.

CERTIORARI GRANTED MAY 7, 1951.

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[Caption omitted]

In United States District Court

Civil Action, File No. 745

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT FORTIER, ET AL., DEFENDANTS

COMPLAINT

(Filed November 9, 1948)

COUNT I

Plaintiff alleges that

1. Jurisdiction of this action is conferred upon this Court by Section 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A., App. Sec. 1821 et seq.), and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41).

2. The defendant, Robert Fortier, is a resident of this District, and the defendants, Vincent Marino and Antonio Marino, are residents of the District of Massachusetts; and said defendants at all times material to this action were partners doing business as Modern Building Company.

3. Pursuant to the provisions of Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A., App. Sec. 631 et seq.), and Executive Orders thereunder, the Civilian Production Administration issued Priorities Regulation 33 (11 F.R. 601, 4085). The Housing Expediter, pursuant to the Veterans' Emergency Housing Act of 1946, issued Housing Expediter Priorities Order 1 (11 F.R. 9507) which delegated to the Civilian Production Administration the powers and authority conferred upon the Housing Expediter by Sections 4 and 7 of said Act. The Civilian Production Administration exercised said delegation of authority in the issuance of an Amendment of Schedule A to Priorities Regulation 33, dated August 27, 1946, and said Regulation was thus continued in effect under both the Veterans' Emergency Housing Act of 1946 and the Second War Powers Act. Further, by Housing Expediter Priorities Order 5 (12 F.R. 2111), and Executive Order 9836 (12 F.R. 1939), the Housing Expediter adopted, ratified, confirmed and continued in effect said Priorities Regulation 33, and that said Regulation has been in effect at all times material to this action.

3 4. Plaintiff brings this action to enforce compliance with the Veterans' Emergency Housing Act of 1946 (Public Law 388—79th Congress) and regulations issued thereunder.

5. Section 944.54(g) of said Priorities Regulation 33 provides that no person may sell any dwelling built under said Regulation for more than the approved maximum sales price.

6. Pursuant to the provisions of Priorities Regulation 33, the defendant, Vincent D. Marino, acting on behalf of the Modern Building Company, applied for and received authorization and priorities assistance under FHA Project Serial No. 88-024-29, approved September 9, 1946, for the construction of two dwellings at the sites now designated as:

66 Crystal Avenue, Derry, New Hampshire

68 Crystal Avenue, Derry, New Hampshire

A photostatic copy of the aforementioned application and approval is attached hereto, marked Exhibit "A", and made a part hereof.

7. Each of the dwellings described in paragraph 6 of this complaint, was subject to a maximum sales price as approved by the Federal Housing Administration, of \$8,350.

8. Pursuant to said authorization and priorities assistance, the defendants, constructed the dwellings located at 66 and 68 Crystal Avenue, Derry, New Hampshire.

9. On or about November 12, 1947, the defendants sold the dwelling at 66 Crystal Avenue, Derry, New Hampshire, to James H. Buckey for \$12,800.00 and thereby violated said Act and Regulation in that the defendants sold said dwelling for a sum which was \$4,450.00 in excess of the approved maximum sales price.

10. On or about December 4, 1947, the defendants sold the dwelling at 68 Crystal Avenue, Derry, New Hampshire, to Deane C. Tasker for \$12,000.00 and thereby violated said Act and Regulation in that the defendants sold said dwelling for a sum which was \$3,650.00 in excess of the approved maximum sales price.

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COUNT II

11. The allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 are re-alleged and incorporated herein and made a part hereof, the same as if fully rewritten herein.

12. Section 944.54(e) of said Priorities Regulation 33 provides that a builder who obtains authorization and priorities assistance to construct a dwelling under said Regulation must construct said dwelling in accordance with the description and specifications contained in the approved application. Specifications in instant case attached as "Exhibit B".

13. With respect to the dwelling located at 66 Crystal Avenue, Derry, New Hampshire, the defendants violated the provisions of said Act and Regulation by failing to construct said dwelling in accordance with the description and specifications contained in the application as approved by the Federal Housing Administration in

the following respects, the value of said items at the time said dwelling was completed being the same as herein designated:

Garage unpainted	\$ 75.00
No laundry trays	35.00
No landscaping	100.00
Bathroom unfinished	200.00
No sidewall light fixtures in living room	15.00

that the defendants sold said dwelling on or about November 12, 1947, to James H. Buckey for the sum of \$12,800.00.

14. By virtue of the foregoing, the defendants received from the purchaser the sum of \$425.00 to which they were not entitled under said Act and Regulation.

15. With respect to the dwelling located at 68 Crystal Avenue, Derry, New Hampshire, the defendants violated the provisions of said Act and Regulation by failing to construct said dwelling in accordance with the description and specifications contained in the application as approved by the Federal Housing Administration in the following respect, the value of said item at the time said dwelling was completed being the same as herein designated:

No laundry trays	\$35.00
------------------	---------

that the defendants sold said dwelling on or about December 4, 1947 to Deane C. Tasker for the sum of \$12,000.00.

16. By virtue of the foregoing, the defendants received from the purchaser the sum of \$35.00 to which they were not entitled under said Act and Regulation.

WHEREFORE, the plaintiff demands:

A. A mandatory injunction requiring the defendants, Robert Fortier, Vincent Marino and Antonio Marino, to make restitution to James H. Buckey in the sum of \$4,875.00.

B. A mandatory injunction requiring the defendants, Robert Fortier, Vincent Marino and Antonio Marino, to make restitution to Deane C. Tasker in the sum of \$3,685.00.

C. Such other relief as may be just and equitable.

DENNIS E. SULLIVAN,
*United States Attorney,
District of New Hampshire.*

Dated at Concord, New Hampshire, 9th day of November, 1948.

(Exhibits A and B omitted from the Transcript of Record by leave of the United States Circuit Court of Appeals for the First Circuit.)

In United States District Court

ANSWER OF DEFENDANTS, VINCENT D. MARINO AND ANTONIO MARINO, AS AMENDED, AND DEMAND FOR JURY TRIAL

(Filed November 29, 1948, Amended September 28, 1949)

Vincent D. Marino and Antonio Marino, answering say:

1. They admit the allegations of paragraph 1 insofar as reference to the Judicial Code is concerned, but deny that this
6 Court has jurisdiction over the controversy here involved insofar as that jurisdiction is asserted to rest on Section 7(c) of the Veterans' Emergency Housing Act of 1946, which was repealed prior to the commission of the Acts here complained of.
2. They admit the allegations set out in Paragraph #2, except that they deny that the defendants were partners doing business as Modern Building Company.
3. They neither admit nor deny the allegations set out in Paragraph #3, but leave the plaintiff to its proof.
4. They deny the allegations set out in Paragraph #4.
5. They neither admit nor deny the allegations set out in Paragraph #5, but leave the plaintiff to its proof.
6. They neither admit nor deny the allegations set out in Paragraph #6, but leave the plaintiff to its proof.
7. They neither admit nor deny the allegations set out in Paragraph #7, but leave the plaintiff to its proof.
8. They neither admit nor deny the allegations set out in Paragraph #8, but leave the plaintiff to its proof.
9. They deny the allegations set out in Paragraph #9, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.
10. They deny the allegations set out in Paragraph #10, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.
11. The answers to Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8, are re-alleged and incorporated herein and made a part hereof, the same as if fully rewritten herein.
12. They neither admit nor deny the allegations set out in Paragraph #12, but leave the plaintiff to its proof.
- 7 13. They neither admit nor deny the allegations set out in Paragraph #13, but leave the plaintiff to its proof.
14. They deny the allegations set out in Paragraph #14, so far as they relate to the defendants Vincent D. Marino and Antonio

Marino and have no knowledge as they relate to defendant Robert Fortier.

15. They deny the allegations set out in Paragraph #15, so far as they relate to the defendants Vincent D. Marino and Antonio Marino and have no knowledge as they relate to defendant Robert Fortier.

16. They neither admit nor deny the allegations set out in Paragraph #16, but leave the plaintiff to its proof.

Further answering, the defendants Vincent D. Marino and Antonio Marino aver:

a. On or about July of 1946, the defendants Vincent D. Marino, Antonio Marino and Robert Fortier entered upon a joint venture or undertaking whereby each of the parties were to pay equal sums of money into a common fund to be held by the defendant Fortier, who was to pay for the expenses of building two houses only, sell them, and after retaining the sum of \$500.00 for himself as the agreed value of the lot of land upon which the houses were to be built, and after paying the defendants Antonio Marino and Vincent D. Marino their regular salary for doing the carpenter work upon said buildings, they were to share any profit equally.

b. That on August 21, 1946, the defendant Vincent D. Marino applied to the Civilian Production Administration for authorization to build the aforementioned buildings and received said authorization and commenced construction of said buildings.

c. That the said defendants Vincent D. Marino and Antonio Marino furnished their money as agreed upon and did the carpenter work.

d. That the said Robert Fortier had charge of the books of the said undertaking and conducted the sale of said houses.

8 e. That the said undertaking ceased when the second building was partially completed and the defendants are without any knowledge of the costs of the construction, of the sale prices or of the completion of the second house, since that was all done by the defendant Robert Fortier without the consent of the defendants Antonio Marino and Vincent D. Marino, and although they have asked the defendant Robert Fortier for an accounting of said transactions, the said Robert Fortier has refused to account to them.

f. That it would be inequitable to the defendants Vincent D. Marino and Antonio Marino if the injunction were issued and would result in an unjust enrichment to the purchasers of the buildings.

WHEREFORE, the defendants Vincent D. Marino and Antonio Marino pray:

1. That the foregoing bill be dismissed.
2. That a jury trial be had on all questions triable by a jury, including but not limited to the questions of the cost of the construction of the buildings, the fair value of the buildings at the time of the sale and at the present time.
3. Such other relief as may be just and equitable.

VINCENT D. MARINO,
ANTONIO MARINO,

By their Attorneys, GREEN, GREEN AND ROMPREY,
By MYER GREEN.

Dated at Manchester, New Hampshire, Twenty-seventh day of November, 1948.

In United States District Court

ANSWER OF DEFENDANT, ROBERT J. FORTIER, AS AMENDED AND DEMAND FOR JURY TRIAL

(Filed November 29, 1948, amended September 28, 1949)

Now comes Robert J. Fortier, defendant herein, and for his answer, says:

9

I

He admits the allegations of Paragraph 1 insofar as reference to the Judicial Code is concerned, but denies that this Court has jurisdiction over the controversy here involved insofar as that jurisdiction is asserted to rest on Section 7(c) of the Veterans' Emergency Housing Act of 1946 which was repealed prior to the commission of the Acts here complained of.

II

He admits the allegations of paragraph 2; except the last clause thereof, and with reference thereto this defendant alleges that the defendants Marino induced this defendant to become a joint adventurer with them in the building of two houses, but that he was and is not otherwise associated with the defendants Marino as a partner in Modern Building Company.

III

He neither admits nor denies the allegations of paragraph 3, but leaves the plaintiff to its proof.

IV

He denies the allegation of paragraph 4.

V

He neither admits nor denies the allegations of paragraphs 5, 6, 7, and 8 but leaves the plaintiff to its proof.

VI

He denies the allegations of paragraphs 9 and 10 insofar as they relate to this defendant.

VII

The answers to Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the complaint are realleged in answer to paragraph 11 of the complaint, the same as if fully rewritten here.

10

VIII

He neither admits nor denies the allegations of paragraphs 12 and 13 but leaves the plaintiff to its proof.

IX

He denies the allegation of paragraph 14 insofar as it relates to this defendant.

X

He neither admits nor denies the allegations of paragraph 15, but leaves the plaintiff to its proof.

XI

He denies the allegation of paragraph 16 insofar as it relates to this defendant.

And further answering, the defendant Robert J. Fortier, says:

XII.

The joint venture between himself and the defendants Marino consisted of an oral agreement that each would contribute \$500 to provide initial working capital; that the defendant Fortier would procure the building lots and arrange further financing; that the defendants Marino would construct two houses thereon; that the houses would be sold; and that the profits therefrom would be divided between the three defendants after payment of wages to the defendants Marino and payment for the land to this defendant.

XIII

The defendant Vincent D. Marino applied for authorization and priorities assistance on, to wit, August 21, 1946, pursuant to Priorities Regulation 33 in effect on August 21, 1946, and, upon securing the said authorization, the defendants Marino commenced construction of the two houses referred to in the complaint.

11.

XIV

That the defendant Fortier borrowed \$13,600 upon his personal note given to the Manchester Federal Saving and Loan Association on October 2, 1946, and that the proceeds of this loan, and \$1,500 contributed by the three defendants, were used to pay part of the cost of construction of the two houses referred to in the complaint.

XV

That the defendant Fortier contributed further sums approximating and being not less than \$13,712.95 which were used by him to complete the construction of the two houses referred to in the complaint.

XVI

That the total sums of money actually expended by the defendant Fortier for the construction of the two houses, plus the \$1,000 contributed by the defendants Marino for that purpose, are not less than \$28,648.62.

XVII

That the two houses were conveyed and disposed of and as a result thereof the total gross sum of money received therefor was \$24,800.

XVIII

That the dwelling now owned by James H. Buckey had a fair market value of \$12,800 when sold to him and now has a fair market value not less than \$12,800.

XIX

That the dwelling now owned by Deane C. Tasker had a fair market value of \$12,000 when sold to him and now has a fair market value not less than \$12,000.

12

XX

That the Federal Housing Authority, which established the maximum sale price of \$8,300 placed upon these houses on September 9, 1946, subsequently to their being built and prior to their sale to the said Buckey and Tasker in November and December 1947 appraised

their fair market values as not less than \$12,500 and \$11,100 respectively.

XXI

That it would be inequitable to the defendant Fortier and would unjustly enrich the said Buckey and Tasker if the mandatory injunctions were issued.

WHEREFORE the defendant Fortier prays:

A. That the petition be dismissed.

B. For such other and further relief as may be just and equitable.

ROBERT J. FORTIER,

By His Attorneys McLANE, DAVIS, CARLETON & GRAF,
STANLEY M. BROWN.

The defendant Robert J. Fortier demands a jury trial on all issues triable by jury.

ROBERT J. FORTIER,

By His Attorneys McLANE, DAVIS, CARLETON & GRAF,
STANLEY M. BROWN.

In United States District Court

OPINION

(Filed February 24, 1950)

A. J. C.

CONNOR, J.:

This is an action brought by the United States of America to enforce compliance with the Veterans' Emergency Housing Act of 1946 (Public Law 388, 79th Congress), and regulations issued thereunder, the pertinent one being Priority Regulation 33 promulgated under Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. 631, et seq.), and later adopted under the Veterans' Emergency Housing Act of 1946. Jurisdiction is conferred by Section 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. 1821, et seq.), and Revised Judicial Code (62 Stat. 869, Title 28 U.S.C. 1345).

On August 21, 1946, the defendants made application for a residential construction permit under Priorities Regulation 33. The application was approved by the Federal Housing Administration, and as approved authorized the construction of two five-room houses, without garages or breezeways, and established a maximum sales

price of \$8356 on each unit. Upon approval of the application, a project serial number and an HH preference rating were assigned. Construction of one house was completed in August of 1947 and the second in January of 1948. During the process of construction certain additions were made in deviation from the approved plans and specifications. The first of the two houses was sold on December 4, 1947, for the price of \$12,000, and the second on November 12, 1947, the price being \$12,800. It is upon these sales that the complainant alleges a violation of Section 5 of the Act, and prays that mandatory injunctions issue requiring the defendants to make restitution to the respective purchasers of the sums received in excess of the maximum sales price and for additional amounts because of alleged failure to complete construction in accordance with the specifications.

The Second War Powers Act and the Veterans' Emergency Housing Act (in part) had been repealed prior to both sales.

In considering the issues of law raised by the foregoing facts which are not in substantial dispute, there is presented at the outset the question of whether the sales were in fact violations of the Act. It is the contention of the complainant that "the repeal of the 1946 Act was accomplished according to and by virtue of Section 1 (b) of the Act itself, and that it was not intended that Section 5 should be repealed."

Section 1 (b) of the Veterans' Emergency Housing Act provides:

"The provisions of this Act, and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the earlier."

Section 5 of the same Act states:

"Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as the rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Section 1(a) of the Housing and Rent Act of 1947 is as follows:

"Section 1. (a) Sections 1, 2(b) through 9, and sections 11 and 12 of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment

of this Act are hereby returned to the Treasury: Provided, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect."

In urging this proposal, the complainant overlooks the fact that the 1946 Act was not repealed by the happening of either of the contingencies designated in Section 1(b), but by the force and effect of Section 1(a) of the 1947 Act, wherein, with the exception
15 of certain sections not here material, there is specific repeal.

The claim is predicated upon the theory that Section 1(a) and the provisions of Section 5 were in effect saving clauses which extended the operation of the statute. This position is unsound, because Section 5 was expressly repealed by Section 1(a) of the 1947 Act. *United States v. Carter, et al.*, 171 F. 2d 530. While it is true that "any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities under the authority of the 1946 Act were to remain in full force and effect possibly to aid completion of construction already commenced under that Act, the statute is silent as to any reenactment barring sale beyond the ceiling price. The complainant cites in support of its position certain unreported cases which hold (a) that a sale consummated subsequent to the repeal of the 1946 Act can be treated as a violation and ground for restitution if the agreement to sell antedated repeal; and (b) that an agreement to build would similarly permit an injunctive order. *Pruitt v. Litman*, D.C., E.D. Pa., February 28, 1949; *Katz v. Litman, et al.*, D.C., E.D. Pa., Civil Action No. 8225, March 25, 1949; *United States v. Tyler Corporation*, Civil Action No. 348, D.C., E.D. Virginia, April 26, 1949. No case has been brought to the attention of the court, however, where the facts are comparable to the instant case, and in the citations offered the reasoning is not clear as to the basis for the conclusions reached. It would appear that the above holdings are grounded upon the rather doubtful premise that liability arose because a contractual relation was created (1) between the Government and the builder in the granting of the application for priorities, or (2) in the agreement of sale made by and between the builder and the purchaser prior to repeal. I cannot adopt the proposal that an enforceable contractual relationship was created by the granting of the application by the Government. The language of the statute negates the idea that a contractual basis was intended or could be formulated; its whole purpose was remedial and regulatory, and a departure from the regulations would permit the invocation of

sanctions or penalties, either civil or criminal. It was plainly
16 a restriction of the private rights of the individual, to be
relaxed by grants, here represented in the priorities. Respecting
the second proposal that a surviving liability could be construed
under an agreement of sale made by and between the builder
and the purchaser prior to repeal, no liability could possibly survive,
for the contract, if such it was, would be illegal, unenforceable,
and devoid of liability. Nor can I subscribe to the application of the
fiction of relating back a sale which occurred subsequent to repeal
to an agreement reached prior thereto in order to constitute a violation.
Upon either of these grounds the theory of contractual relation
must be rejected and with it disappears any surviving liability which
could be comprehended within Section 109 of Title 1 U.S.C.A. to
form a basis for prosecution subsequent to repeal. Title 1, U.S.C.A.,
109 provides that in the repeal of any statute such shall not have the
effect to release or extinguish any penalty, forfeiture or liability
incurred under such statute, unless the repealing Act shall so
expressly provide, and the statute is to be treated as still remaining
in force for the purpose of sustaining any proper action or prosecution
for the enforcement of such penalty, forfeiture or liability. Nothing
in the 1947 Act undertakes to release or extinguish the foregoing,
and the rule would be available to the complainant if there were any
sound basis for it, but none is here presented.

It is my view that the sale itself is the violation contemplated
by the statute; if it occurred prior to repeal, it could be prosecuted
before or after repeal; if it occurred subsequent to repeal, it cannot
be held to be a violation. Here clearly the facts necessary to constitute
a violation occurred after repeal. No proviso is contained in the
Act of 1947 to maintain ceilings on the sale price of dwellings, and
the failure to so provide might well have been that Congress deemed
the situation did not require further supervision. Whatever powers
were vested in Priorities Regulation 33 of the Second War Powers
Act, under which it was promulgated and later adopted and continued
in effect under the Veterans' Emergency Housing Act, would appear
to have been abrogated. The Second War
17 Powers Act was repealed by the First Decontrol Act of 1947
(80th Congress, 1st Session, Public Law 29, Approved March
31, 1947, and effective June 30, 1947. The Housing and Rent Act
of 1947 carries the same effective repeal date.

Accordingly, there must be judgment for the defendants, and an
order to that effect will be entered.

February 24, 1950.

In United States District Court

JUDGMENT

(Entered February 27, 1950)

A.J.C.

It is considered by the Court, the Honorable Aloysius J. Connor, District Judge, that judgment be, and it hereby is entered for the defendants, in accordance with Opinion of the Court filed on the twenty-fourth day of February, 1950.

By the Court,

WILLIAM H. BARRY,
Clerk.

In United States District Court

PLAINTIFF'S NOTICE OF APPEAL

(Filed April 24, 1950)

Notice is hereby given that the United States of America, the plaintiff in the above entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in the said action on February 27, 1950.

Dated this twenty-fourth day of April, 1950.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN,
JOHN J. SHEEHAN,
United States Attorney.

18

In United States District Court

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

(Filed May 18, 1950)

1. The District Court erred in ruling that no contractual relationship was created between the Government and the defendants by the granting of the application for priorities.
2. The District Court erred in holding that Priorities Regulation 33 was voided by the Housing Act of 1947.
3. The District Court erred in holding that the Housing Act of 1947 automatically released from the regulations imposed under the Veterans' Emergency Housing Act of 1946 all housing built under authorization and with the assistance of the latter act.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN,
JOHN J. SHEEHAN,
United States Attorney.

In United States District Court

PLAINTIFF'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed May 18, 1950)

The United States of America, the appellant, hereby designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal from the judgment entered in the above-entitled action:

1. Complaint.
2. Answer of Defendants, Vincent D. Marino and Antonio Marino, as amended, including demand for jury trial.
3. Answer of Defendant, Robert J. Fortier, as amended, and demand for jury trial.
4. Condensed statement, in narrative form, of testimony, which statement is filed herewith.
- 19 5. Opinion.
6. Judgment.
7. Plaintiff's notice of appeal.
8. Statement of points on which appellant intends to rely.
9. This designation.

UNITED STATES OF AMERICA,
By JOHN J. SHEEHAN;
JOHN J. SHEEHAN,
United States Attorney.

In United States District Court

CONDENSED STATEMENT OF TESTIMONY, AS AMENDED

(Filed July 7, 1950)

The defendant, Vincent D. Marino, upon his return from military service, together with his father, Antonio Marino, both of whom had prior experience as carpenters, decided to enter the business of building contractors, in the summer of 1946. They agreed with the defendant, Fortier, to build for sale two houses in Derry, New Hampshire. Fortier was an automobile and real estate salesman and had no prior experience as a building contractor.

Fortier contributed land which he owned on Crystal Avenue in Derry, upon which street he also had his residence, as the site for the two proposed houses, and arranged for construction loans with the Manchester Federal Savings and Loan Association to provide working capital for the project.

On August 21, 1946, the defendants, as Modern Building Company, made application to the Federal Housing Administration on CPA Form 4386 for residential construction approval and

priorities, rating for two units under Priorities Regulation 33, and filed blueprint plans and specifications with that application. This application was approved by the Federal Housing Administration, and, as approved, authorized the construction of two five-room houses, without garages or breezeways shown on the plans and referred to in the specifications, and established a maximum sales price of \$8,350 on each unit. Upon approval of the application, a project serial number and an H H preference rating was assigned for use in accordance with PR33 in purchasing the minimum quantity of materials listed in Schedule A to PR33 required for completion of two units of the project described.

Construction of one house was completed in August of 1947, and the second house was completed in January of 1948.

During the process of construction, additions were made in deviation from the approved plans and specifications. Officials of the Federal Housing Administration inspected the project in the process of construction, observed certain of the additions being built and did not disapprove or complain about them.

The first of the two houses to be completed was sold on December 4, 1947, for a price of \$12,000. Additions on this house included a staircase to the second floor, electrical wiring of the second floor, windows in the gable ends of the second floor, a one-car garage complete with driveway, and a breezeway connecting this garage and the house proper.

The second house was sold on November 12, 1947, before completion, the sales price being adjusted to \$42,800. Additions on this house included a garage, breezeway, outside bulkhead to the basement, a staircase to the second floor, a dormer on the second floor, and three rooms completely finished on the second floor including windows, ceiling, asphalt tile floor, light fixtures, and heating radiators.

It was admitted that two concrete laundry trays included in the specification for each house were not provided, and that in the second house a bathroom was not finished, and loam was not spread on the lawn. The purchaser of the second house, however, admitted that he had been allowed a money adjustment because of these latter two items.

21 There was no contact between the defendants or any of them with either of the purchasers of the two houses until after July 1, 1947, no pre-existing agreements, and no contractual relationship or negotiation toward a sale at any price was entered into by the defendants or any of them with either purchaser prior to June 30, 1947.

It is upon these sales that the complainant alleged a violation of Section 5 of the Veterans' Emergency Housing Act of 1946 (Public Law 388, 79th Congress), and prayed that mandatory injunctions

issue requiring the defendants to make restitution to the respective purchasers of the sums received in excess of the maximum sales price, and for additional amounts because of alleged failure to complete construction in accordance with the specifications.

The defendants demanded trial by jury, and the plaintiff moved to strike the demand for jury trial, which motion, after hearing, was granted, subject to defendants' exception.

The defendants moved to abate the complaint, and to dismiss the complaint, for reasons which appear in the motions, both of which motions were denied, subject to defendants' exceptions.

The factual defense relied upon consisted of allegations that the defendants expended sums for the construction of the houses which exceeded the amounts received by way of the final sale prices, and that the houses were reasonably worth the amounts for which they were sold when sold and at the time of trial. Offers of proof related to these defenses were rejected, subject to defendants' exceptions.

In United States District Court

MATERIAL PORTIONS OF THE TRANSCRIPT OF THE EVIDENCE AS DESIGNATED BY THE PARTIES

Mr. BRANCH: May it please the Court: This is an action brought by the United States of America against the defendants Fortier and the Marinos, who were doing business as the Modern Building Company, for violation of the Veterans' Emergency Housing Act of 1946, and the more subsequent Priority Regulation 33 which was promulgated under the authority vested in him by that Act to make regulations concerning priorities in the construction of houses. The Government alleges and will show that the defendants sought and received priority assistance from the Government, and that after they had obtained the priority assistance with the aid of such assistance they constructed two dwellings which were subject to sale at a maximum price in the final analysis set by the Government, and which was according to law a binding maximum sales price upon the builders. However, the Government will show that one of the houses built by these builders was sold—which was supposed to have been sold for a maximum of \$8350, was sold on or about November 12, 1947 to Major James H. Buckley for the sum of \$12,800; and that the second of the two dwellings in question, which also had a maximum sales price of \$8350 set on it, was sold to Captain Deane C. Tasker for \$12,000. The Government will also introduce evidence indicating and showing that the specifications filed and accepted by the Government in the application for priority assistance by the builders were not complied with, and that

therefore there should be restitution made of a certain amount for failure to comply with the specifications which controlled the building of the houses. The Government seeks a mandatory injunction requiring the defendants to make restitution to the buyers of these two houses of the difference between the price for which the houses were sold and the maximum prices which had been set, plus an amount as damages for the failure to fulfill the specifications which were binding upon the builders because of the fact that they had obtained priority assistance.

With the Court's permission I will call the first witness.

23 Testimony of WILBUR E. TEWKSBURY. Sworn.

Direct examination.

Questions by Mr. BRANCH:

The COURT: Do you claim, Mr. Brown, that what the contractors spent is important?

Mr. BROWN: Yes.

The COURT: Why? Isn't there a ceiling placed here by the statute?

Mr. BROWN: There was when there was a statute, Your Honor, and if the Statute controls, I suppose that ceiling was still on.

The COURT: If the Statute controls, if it does control, what your contractors spent is of no importance, and if the Statute does not control, then the plaintiff has no case, anyway.

Mr. BROWN: I cannot agree, Your Honor, with your suggestion that if the Statute controls, what the contractors spent is of no importance. This is not a case where the Government is seeking future compliance with an order, or is seeking a penal execution against the contractor. This is a case in equity for restitution, and it is based on equity principle. If, in fact, my client and the other defendants in this case have already suffered a substantial loss in the building and sale of these houses, it is our position that it would be highly inequitable for this Court to order that they make an overpayment to the people who now own the houses. That is our position. That is our defense.

The COURT: What do you say to that?

Mr. BRANCH: I submit, Your Honor, that the evidence of the Crystal Motors' bank account is completely irrelevant to anything that is in this case that has been brought up in this case by our complaint or the defendant's answer.

The COURT: Why is it? You differ with Mr. Brown in his suggestion that this is wholly an equity matter?

Mr. BRANCH: Yes, I do.

The COURT: Statutory, you say?

Mr. BRANCH: Yes, statutory. It is also the contention of the government that regardless of how much the houses cost, that they were bound by the maximum price set unless they sought permission and obtained permission to increase the maximum price.

Testimony of WILLIAM F. BAKER. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?

A. William F. Baker.

Q. What is your occupation or profession?

A. I am Assistant District Director of the Federal Housing Administration.

Q. And your office is where?

A. Manchester, New Hampshire.

Q. What are your duties?

A. My duties are the administration of affairs of the Federal Housing Administration in New Hampshire.

Q. In the course of your office business did you receive application for priorities under the Priorities Regulation 33 of the Veterans' Emergency Housing Act of 1946?

A. We did.

Q. Can you identify this document for me, please?

A. This CPA form 4386 is an application form used in the application for priorities assistance during that period.

Q. By whom was that application made?

A. The application was made in the name of the Modern Building Company, Box 125, Derry, New Hampshire.

Q. And by whom was it signed?

A. Signed—the application was signed by Vincent D. Marino as the signature of the owner and authorized official. His title was "Authorized Official Superintendent."

Mr. BRANCH: We offer the application.

Mr. BROWN: No objection.

The CLERK: Received and marked Plaintiff's Exhibit 3, Application for Priorities assistance, dated August 21, 1946, signed by Vincent D. Marino.

Q. Regarding Plaintiff's Exhibit 3, Mr. Baker, is there—well, first, with what kind of construction and how much construction does it deal with?

A. This deals with the construction of two buildings.

Q. Located where?

A. At Derry, New Hampshire.

Q. Does it give any other location?

A. No. Crystal Avenue, Derry.

Q. What kind of houses?

A. Two five room units.

Q. And does the Plaintiff's Exhibit 3 indicate the setting of a maximum price on those dwelling units?

A. It does.

Q. And what was the maximum price?

A. As established, \$8350.

Q. That was for one or both houses?

A. For each.

Q. Again referring to Plaintiff's Exhibit 3, could you explain to the Court the significance of the project serial number which appears in the upper right hand corner, and what is it?

A. 88-024-29. I beg your pardon. The 88 was the regulation under which it was issued for the Administrative purposes. The 24 was the State number and 29 was the serial number of this application.

Q. What if any use was made of that number by the applicant for priority assistance?

Mr. BROWN: Objection. This witness honestly cannot know what use was made of it by these defendants.

The COURT: Only so far as appears on the document.

Mr. BRANCH: I think my question wasn't possibly fully phrased. I was not referring to any particular applicant; I was asking him in general what is supposed to be done,—what use is supposed to be made of that project serial number by an applicant,—by any applicant,—of what effect and what bearing has it on him.

The WITNESS: May I explain at the time, please?

Q. Yes.

A. The Federal Housing Administration was acting as an agent for the Civilian Production Administration, and what was done with the numbers, and how applicants of priority assistance having gotten the approval of our office,—what they did with it, we didn't know.

That is, I do not know,—or I do know that there were from time to time various materials were to have been ordered on a priority basis, and in some instances the houses for construction of veterans and houses to be constructed under this authority, under this approved application, were to be obtained. Some

other types of construction may have prior authority. I think that I am not competent to answer just what would be done with it, or just how.

Q. Well, can you answer this for me: Would any other priorities assistance applicant have the same number as appears on this application of the Modern Building Company?

A. No.

Q. Can you also identify this document for me, please?

A. This is Form HH 1012, Outline Specifications, which bears the same number: 88-024-29, and undoubtedly was the number put on this document by our office as the Outline Specifications as of the houses to be constructed under this authority for priority assistance.

Mr. BRANCH: Any objection?

Mr. BROWN: No.

The CLERK: Received and marked Plaintiff's Exhibit 4, titled "Outline Specifications" dated August 21, 1946, signed "Modern Building Company, R. J. Fortier."

Q. Looking at Plaintiff's Exhibit 4, who is named as the applicant?

A. The Modern Building Company.

Q. And by whom is the specification signed?

A. The specifications are signed by the Modern Building Company, R (something) Fortier.

Q. Well, it looks like J, doesn't it?

A. Yes.

Mr. BROWN: We will admit that is R. J.

Mr. BRANCH: Thank you.

Q. Now would you again tell the Court the relation between this Outline Specifications, which is Plaintiff's Exhibit 4, and the application for Priorities Assistance, Exhibit 3?

A. By the information here, it was apparent that—it appears, at any rate, that the priorities assistance was based partly upon the Outline Specifications.

* * * * *

27 X Q. By the way, when you set these maximum prices,—when you do that, that price was set at a level which was supposed to give the contractor a fair profit on his operations, wasn't it?

A. Yes.

X Q. And the price was always set with that in view, that a reasonable profit was proper, and should be allowed for?

A. Yes.

X Q. And that is one element that is supposed to be taken care of by the price that your Agency set?

A. Yes.

X Q. And when you established your price, you established it upon the basis of what a competent contractor should be able to build the building for, that is correct, isn't it?

A. Yes.

X Q. And in individual cases, a contractor might not be as efficient as the other, and the cost might go up?

A. Right.

X Q. And that happened from time to time?

A. Often.

R. X Q. Just a couple of other things, Mr. Baker. From August of 1946 until the beginning of 1948 did construction costs go up, down, or did they stay about the same?

A. Construction costs were increasing constantly.

R. X Q. And whether or not the increases during the eighteen months between August of '46 and January of '48, whether that increase was substantial or slight?

A. Substantial.

R. X Q. If you assume, Mr. Baker, that at the site of these two houses, garages and breezeways were built, attached to each house, and that on one of the houses the up-stairs was finished off into three rooms with a dormer and stairs leading up to it, and on that same house that a back staircase to the basement was added in addition to anything called for on the plan, and that in that other house, although the up-stairs was not finished, a staircase to the up-stairs was added that was not required by the plan, and electrical fixtures were wired into the up-stairs,—if you assume that those things were done on these two buildings, in your opinion would the contractors, had they applied for increases, have received them from your office?

28

Mr. BRANCH: I object, Your Honor.

The COURT: Wait a minute. What is your objection?

Mr. BRANCH: There is no evidence in here so far that the assumptions which he has given the witness were in effect actualities in the two particular houses involved.

Mr. BROWN: We will undertake to prove that, Your Honor.

The COURT: I thought what you were driving at was the proposition of what might be permitted. You were bound by the ceiling, weren't you?

Mr. BRANCH: That is true. I have maintained that. I haven't objected since then because I more or less gathered from the Court

at least that at present you were admitting evidence in regard to valuation. It is our contention that it is irrelevant for that reason, also,—that they were bound by the maximum price, and any extras they put in were at their own cost or expense.

The COURT: You are approaching it from an equity angle.

Mr. BROWN: That is correct. We are taking the position that if the defendants here built \$15,000 houses down there which these plaintiffs in interest bought at \$12,000, they are not entitled to make any sum on the transaction.

The COURT: Even though in building the \$15,000 houses, you violated the statute?

Mr. BROWN: Anything we did is a matter of proof, and this witness has previously testified that on inspection it was noted that additions were being built which did not constitute anything which gave cause for complaint by the Federal Housing Authorities which were in charge of these matters. I can't believe the situation is,

29 Your Honor, that these defendants were under any technical violation in some of the regulations in failing to come back from time to time to get additional authorization. I think the evidence will so disclose. What I am asking this witness is, Assuming that they had come back, whether in his opinion as an official of the agency concerned at that time, increases would have been permitted them under those circumstances.

The COURT: I will permit it. He may answer.

The WITNESS: In the case of an authorization being issued and the contractor or owner, whichever the case may be, came back and said that the prices had changed, or "we are going to put more into the house," we would consider the facts, and if they warranted it, on the basis of the information available, we would increase the allowable maximum sales price.

R. X Q. And if what they were adding was something that was unreasonable, I suppose you would turn down the application for the increase?

A. If what they were adding, let us say, was something that was not permitted, such as a second bath for one unit, we would turn it down.

R. X Q. But if it were in a permissible area, you would consider it on the merits?

A. Yes.

Testimony of WALTER B. SUNDEEN. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?

A. Walter B. Sundeen.

Q. Where do you live?

A. 487 Bridge Street, Manchester, New Hampshire.

Q. What is your occupation?

A. Lumber dealer.

Q. Did you at my request bring up today a part of the records kept in the usual course of your business?

A. I did.

Q. That was lumber business?

A. Yes.

Mr. BRANCH: That is the records of Mr. Sundeen.

Mr. BROWN: We have no objection at all to his testifying about them.

30 Q. Mr. Sundeen, what if anything do your records reveal with regard to purchases, if any, made by the Modern Building Company?

Mr. BROWN: Do I understand that the witness has before him his records?

Mr. BRANCH: He has some records, yes.

Mr. BROWN: His own records?

Mr. BRANCH: That is right.

Q. What you have in your hand,—what is what you have in your hand?

A. Well, this is a record of all priorities ratings.

Q. Whose is it?

A. Our records.

Q. (Second Question Back Repeated) Mr. Sundeen, what if anything do your records reveal with respect to purchases, if any, made by the Modern Building Company?

A. Well, our records show the office invoices which are kept on file.

Q. Whether or not they show any purchases by the Modern Building Company from you?

A. No. Some companies do furnish us with their own purchase orders, but some companies don't. Our records,—the only records we have is of the merchandise that was actually ordered by them and delivered.

Q. Well, does it indicate that any merchandise was ever ordered by them and delivered to them by you?

A. Oh, yes.

Q. And I show you—can you identify that, please?

A. Yes. It is our permanent record of a delivery made to their place of construction, or wherever they called for it; it is hard to indicate, but it shows that there was.

Q. Does it not indicate sale to them?

A. It indicates a sale.

Mr. BRANCH: We offer this as an exhibit.

The COURT: Well, a sale of what?

Mr. BRANCH: Well, of material. I am sorry.

The WITNESS: Yes, a sale of four windows.

Q. Well, I will wait a minute before I offer it. Now can you describe what these marks down here,—what is that?

A. Well, those marks indicate that the Modern Building Company was authorized to buy these materials through the H.H. rating.

Q. And whether or not your records indicate anywhere what their number was, their priority number?

A. Well, we would have to obtain their priority number before we would make shipment.

Q. You would have to?

A. Yes.

Q. And is there anything in your records which shows a rating number and a priority number for them?

A. Oh, yes.

Q. And what is the number that you have in your records as their rating number or priority number?

A. Well, our record is 88-024-29.

Q. And to refer again to this HH on this sales slip, it indicates that at time of that sale they had already filed upon it, or does it not

A. Yes.

Q. They had filed a priority rating number with you?

A. Yes.

Q. And whether or not that had any effect in their obtaining that order of supplies from you?

A. It certainly did. In order to obtain their building materials, they would have to have an H.H. rating, and we would generally refer to the books, and of course the one in charge of that in the office knew the different accounts and knew who had H.H. ratings and who did not.

Q. And is this the book that was kept of those accounts?

A. That's right.

The CLERK: Received and marked Plaintiff's Exhibit #8, Sales Slip, Sundeen Lumber Co. to Modern Building Co., to the total amount of \$18, 12/10/46.

Q. In other words, then, Mr. Sundeen, is it accurate to say that in order for them to have obtained these materials from you, they had to give you their priority rating number?

A. Definitely so.

Mr. BROWN: I suppose, Your Honor, that whether or not to get this material required an H.H. rating should be proved by the document that established the fact. Now if they are in the regulations under Schedule A or something else, I think that is the way to prove it rather than this gentleman's recollection as to what or what was not on the list.

Mr. BRANCH: I am not concerned with the HH rating, I am concerned with the fact that in order to obtain supplies, they had to have a priority number, which we have submitted.

Mr. BROWN: Are you speaking about Mr. Sundeen's business policy or what was required by the law or regulation?

Mr. BRANCH: I am talking about what was required in order for the Marinos and Mr. Fortier to obtain material from Mr. Sundeen. In other words, to put it very simply, I am trying to show that the priority rating was in fact used by Fortier and the Marinos.

Mr. BROWN: I object.

The COURT: He says that isn't the way to prove it.

Mr. BROWN: The only evidence in the case as to anything secured from Mr. Sundeen was four sets of windows. Whether or not the windows went on the priority list, I don't suppose Mr. Sundeen knows of his own knowledge. I suppose it is demonstrable, if it is so, that it was obtained by means of the regulation, as to the list of materials acquired at that time.

The COURT: This prior witness indicated that the men got that priority rating.

Mr. BRANCH: Yes, the testimony is to the effect that at the time the application for priority assistance was given that a number was assigned.

The COURT: Whether or not a number was assigned?

Mr. BRANCH: I think the evidence, if you will remember, revealed that the number was 88-024-29.

The COURT: I know he spoke of a number.

Mr. BRANCH: Which is the number that appeared on the project.

The COURT: It isn't clear to me--I think there is evidence that these people did have a priority number.

Mr. BROWN: That is so.

The COURT: Now that probably doesn't answer the problem that you have raised here as to whether or not Mr. Sundeen knew that, or that the Regulations required that such a number be available in order to obtain the four sets of windows.

Mr. BRANCH: I think it is incidental—

The COURT: What are you trying to show through this witness?

Mr. BRANCH: That they did in fact use their priority job number, project number, to obtain supplies.

The COURT: Whether or not that priority rating number was necessary to obtain four sets of windows?

Mr. BRANCH: Yes, that is right.

The COURT: Does that follow, or is that a matter of proof? Are you stating that in order to obtain any sort of supplies that he must have a priority rating?

Mr. BRANCH: No, I am not, Your Honor. All I am trying to get evidence of is that these defendants were assigned a priority rating number and that that project rating number was used to obtain supplies from Mr. Sundeen.

The COURT: Rightly or wrongly?

Mr. BRANCH: Yes.

The COURT: That is, whether it is necessary or not?

Mr. BRANCH: That is right, and he has testified that the records showed that he knew that they were authorized to buy through the priority rating.

The COURT: It is Mr. Brown's point to have it established that as a matter of law it was necessary to obtain that to get these windows.

Mr. BRANCH: That is all I am trying to prove.

Mr. BROWN: May I have an exception to the question on the basis of my objection?

The COURT: What question are you excepting to?

Mr. BROWN: To the pending question, which is general in terms, and which is restricted to the building materials on the priority rating.

The COURT: Restate it so that we can have it clear just what you are asking now, Mr. Branch.

34 Mr. BRANCH: My question was actually a question as to what he previously testified to, so I will strike it out, it is all right with me. I was just rephrasing what he already said.

The COURT: In that case, strike out the question and answer.

Mr. BRANCH: Yes.

Q. Well, referring to Plaintiff's Exhibit 8, will you state again what the significance of the HH rating on the slip is?

A. The significance of the HH rating indicated that a priority number had been issued by the priority ratings board that we could

use, so that when we extended the ratings to the companies we bought from, we would have something to back it up with. In other words, we couldn't very well buy building materials unless we backed it up with ratings, and the only way you do that, we would have to have ratings from the ones who bought it from us.

Q. Well, whether or not the fact that there was a HH rating on that,—that they did have a HH rating, was influential in their obtaining windows?

A. That's right.

Q. Well, was it or wasn't it?

A. It was.

MR. BRANCH: No further questions.

Cross-examination.

Questions by Mr. BROWN:

X Q. Mr. Sundeen, do you know whether or not windows were at that time on the list of materials that you could not sell except to HH priority holders? Do you know for a fact whether those windows were on such a list?

A. That I couldn't say.

X Q. Do you know where those windows went?

A. Apparently they went to the address designated.

X Q. What address is that?

A. Crystal Avenue, Derry, New Hampshire. That could be the address of the job, and sometimes it could be the address of the contractor.

X Q. And you know, do you not, in this case that is the address of both the job and the contractor? Do you know that from
35 your records?

A. Well, I wouldn't know that. It had to be one or the other.

X Q. And do you know whether or not Modern Building Company had more than one job going on in December of '46, when those windows were delivered?

A. No, I wouldn't know.

X Q. Do you know for a fact whether those four windows were used on the two houses involved here, or not?

A. No, we do not. We assume that they were.

MR. BROWN: May I ask that the last phrase be stricken, Your Honor?

* The COURT: Strike it out.

MR. BROWN: That is all.

Redirect examination:

R. D. Q. Just one thing, Mr. Sundeen. These records that we are talking about that you have in your hand, do they indicate the assignment of a priority rating number to the Modern Building Company?

A. That's right.

R. D. Q. And what is that number? Look at the book.

Mr. BROWN: We admit, Your Honor, that the number that appears on the Exhibit already in was the number assigned to us.

R. D. Q. Have you any other project rating in your book in regard to Modern Building Company?

The COURT: Do I understand that each building had a rating and each project had a number?

The WITNESS: Yes. 88-024-29.

R. D. Q. Do your records reveal any other project number assigned to the Modern Building Company?

A. No.

Recross-examination:

R. X Q. Mr. Sundeen, just one question. Do you have in your records anything that you know of signed by either Mr. Fortier or Mr. Marino as to supplying them with materials that are listed on Schedule A of Price Regulation 33 for two houses that they were building at 66 Crystal Avenue and 68 Crystal Avenue? Do you have anything signed by either one of them asking you to supply priority materials under that Regulation?

A. No, we have no signatures or no records in the office any more than when they would call to the office to purchase building materials, in order for us to sell them, they would have to furnish us with the priority number for that particular job.

R. X Q. And no certificate asking for materials was ever given to you signed by either Fortier or either of the Marinos, so far as you know?

A. So far as I know.

Mr. BROWN: That is all.

Mr. BRANCH: That is all, Mr. Sundeen. Thank you very much.

September 29, 1949.

Testimony of VINCENT D. MARINO. Sworn.

Direct examination.

Questions by Mr. BRANCH:

Q. What is your full name, please?

A. Vincent D. Marino.

Q. What is your occupation?

A. I am a carpenter by trade.

Q. Where do you live?

A. Lawrence, Massachusetts.

Q. Can you tell me, Mr. Marino, whether or not you were ever connected with the Modern Building Company, so called?

A. Yes, I was.

Q. And who was associated in that business with you?

A. Mr. Fortier and my dad.

Q. Your father's name being what?

A. Anthony Marino.

Q. And what construction did that company do while it was in existence?

A. Well, just those two dwellings that we have been discussing.

Q. They were built on a priority, were they?

A. Yes, they were.

37 Q. What is the location of the two houses that were built?

A. On Crystal Avenue.

Q. And what is the number?

A. I don't recall the exact numbers.

Q. Well, are they 66 and 68, do you know?

A. No, I am not positive as to the numbers.

Q. Are they the houses that were purchased by Capt. Tasker and Major Baickey?

A. Yes, they are.

Mr. BRANCH: You may inquire.

Mr. GREEN: We will reserve our questioning until the defendant's case, Your Honor.

Mr. BRANCH: May it please the Court, the Government rests.

Mr. BROWN: If the Court please, we will be as brief as we can in our defense. We propose to put the witness on to establish that the cost of building these two houses to these defendants was in excess of \$27,000 for the two houses which were sold for \$24,800. We propose to also show that the materials that went into the construction

of the houses and the workmanship was above that required by the specifications, with the result that a more costly and more valuable house was constructed than was required under these regulations. We will also have a witness who will testify as to the dates of completion, which may not be clearly on the record at this time. And we will have some testimony concerning the value placed upon these houses by the Federal Housing Administration and the Veterans' Administration after the houses were completed, and before these sales took place.

Testimony of VINCENT R. SWANBURG. Sworn.

Direct examination.

Questions by Mr. BROWN:

Q. Let me ask you first, sir, what would it have cost in your opinion for a competent contractor to have built a house up to the specifications,—the requirements of the specifications?

Mr. BRANCH: I object, Your Honor, on the ground it is irrelevant in any way to this case.

38 The COURT: I have some doubts as to its materiality. You are urging this on the proposal of equitable relief, are you?

Mr. BROWN: If Your Honor please, I would like to develop what Mr. Swanburg, whom I believe to be competent to testify on the matters,—what he says in his opinion a fair cost to a competent contractor should have been. First, to build the portion of the houses for which the approval was given; Two, the specifications which were filed; then how much it should have cost a reasonably competent contractor to have built that section of the structures as that section was actually constructed, and Third, to ask him for his opinion as to the probable cost to a competent contractor to have built the entire structures as they exist, and I propose—

The COURT: Do any of those three categories affect this case?

Mr. BROWN: Standing alone, perhaps they do not affect it at all, Your Honor, but I propose to show that these defendants actually spent a reasonable amount of money in constructing them, even though they were not perhaps as competent contractors as they should have been. We are going to produce evidence of actual cost incurred by these defendants. I suppose that if they merely went out and squandered their money, that would be one thing; if, on the other hand, they were faced with a situation where the cost went up, and during that period it would have cost any contractor more

money to build them. I suppose it is relevant evidence in an equity action of this type.

The COURT: Isn't this the price that we are operating under? They proposed to build a house for a certain figure, and they went to the Board to get priority and went ahead on that basis, and there was a ceiling set of some Eighty-three or five hundred dollars. The understanding was that they would build them for that. Wasn't that the condition upon which the priorities were issued?

Mr. BROWN: That was the condition under which the priority rating was granted.

39 The COURT: Yes, and the materials furnished.

Mr. BROWN: No, Your Honor, I don't think there was any evidence in this case that the material was furnished anyone on a contractual basis of that type.

The COURT: No, but the priorities were issued on the understanding that the house on which the materials and priority were granted would be sold for Eighty-three or Eighty-Four Hundred dollars, isn't that it?

Mr. BROWN: I believe, Your Honor, that the witness Baker testified that if costs increased during the period of construction—

The COURT: —they could go back and get relief.

Mr. BROWN: Or if additions were built into the building that increases would have been probably granted had they applied for them.

The COURT: Which they did not do. That is the difficulty.

Mr. BROWN: I don't concede, Your Honor, that the fact that these individuals failed to take a technical step which would have resulted in increased price should cause this Court to close its eyes to the facts as to the cost and value of the houses which are involved here.

The COURT: Well, while it is in a measure an equity proceeding,—that is, equitable relief is asked for in the form of restitution, it is still a statute that the Government invoked, isn't it a matter of law in that respect.

Mr. BROWN: The plaintiff looks to a statute to find a cause for complaint, but the plaintiff is in this court seeking equitable relief and equitable relief only; consequently, it seems to us that we have the equitable rights of a party in equity in this action. It seems to us that one of the equities in this situation is the amount of money that we put into these houses and the amount of money that those houses now represent:

The COURT: What do you say to that, Mr. Branch?

Mr. BRANCH: I submit that we are in here on an action that is sound in equity, but also under a statute, and the main crux of our complaint is that there was a maximum price set here as a part of a contract between the Government and the priority applicant, and that there was a violation of that contract

when the houses were sold by the builder for greater than the maximum price, without his having had or tried to have had an increase in that maximum price, and with his failure to obtain or even having tried to obtain an increase in that maximum price, that makes irrelevant at this time any testimony as to the value of the houses at the present time.

The COURT: You feel he is firmly bound by the conditions under which a priority was issued?

Mr. BRANCH: I do, indeed, Your Honor.

The COURT: You mean the statute is not flexible enough that a man can get relief, even though he doesn't seek it himself, but comes in later when complaint is alleged against him, and proceeds in equity. You mean he takes no steps to get a modification of the order—

Mr. BRANCH: That is right.

The COURT: Do you see any elasticity in this statute that would give you that right, Mr. Brown? But there it is, and there is firm language there, how can you get relief out of it? You either violate it or you don't.

Mr. BROWN: If the Court please, the regulation, the violation of which we are charged here, provides only for criminal penalties for legal violation.

The COURT: Is it a penalty? Do you claim it is a penal statute?

Mr. BROWN: The only remedy given under this regulation is a criminal action. Now if we were here on a criminal prosecution, we would be able to show this situation in justification, and I say at least in equity we have as much right to show justification as you would in a criminal action at law. Now there is nothing in this regulation that gives the Government the right to come in here seeking to compel restitution. It is because of that fact that they have to come in on an equitable complaint.

The COURT: Isn't that the only way they can proceed?
41 There is no penalty attached to it. Restitution isn't a penalty.

Mr. BROWN: That is correct, Your Honor. What I am pointing out is that the only function the statute performs in this case is to give them some peg to hang a complaint on, but so far as their remedies are concerned, they stand before this Court in no better position than the defendants do before the Court in equity, and your function, I believe, Your Honor, is to administer equity between the parties defendant and the real parties plaintiff: Capt. Tasker and Major Buckey. The Government stands in the middle, using its offices to attempt what they say is an equitable solution here.

The COURT: Well, is it wholly that simple? Isn't this the situation? The evidence isn't all in yet, but as I view it, what actually

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happened was, these contractors went to the priorities board, received priorities to purchase certain materials, and they used those materials to build a certain house, for which a fixed maximum price was placed thereon. At some stage of the proceedings, they have either enlarged this house, they have made additions to it beyond the specifications, beyond the ceiling, or which would take them beyond the ceiling?

Mr. BROWN: That is correct.

The COURT: Or through some manner, either through incompetency or mismanagement, they have gone to an excess, over \$8300. That must have appeared to them somewhere along the road, that they were getting beyond their depth here, as far as expense was concerned.

Mr. BROWN: I believe the facts will so indicate.

The COURT: Then they had a right, or they were entitled then to go back to this Priorities board and get that ceiling raised.

Mr. BROWN: Provided, of course, that the controls were still on.

The COURT: We are assuming that.

Mr. BROWN: Yes, that is so.

The COURT: Of course, if the statute has no application, that is the end of the case. But if they go along and do nothing
42 except get in deeper,—if that is what you claim they did,—and having through their own misconduct, or through their own incompetence got themselves into this situation, they ask now to be rescued from it.

Mr. BROWN: No, Your Honor. We merely ask that this Court in the name of equity not try to drive us deeper in the hole. We are down forty-five or \$5,000 more than we would like to be, and the Government wants to put us down \$8,000 more. We have taken our licking and learned a lesson, so far as construction is concerned. Now the Government comes here asking for a mandatory injunction, which issues from this court only in equity proceedings, compelling what they call restitution, equity, to stick the burden greater onto these parties.

The COURT: But the troublesome problem here, Mr. Brown, is whether or not the statute gives this court any authority to minimize the claim for which the parties or purchasers seek under this statute. Where does the statute give me any authority or any loophole here to say that while they have got in over their depth and gone beyond their maximum, they have done it because of certain conditions, some of which they had no control over, and some of which probably they had full control of? Now how can they be granted any relief under the plain application of the language of the statute?

Mr. BROWN: Brother Green suggests to me, Your Honor, that this statute on which the Government relies, gives to the administrators of the acts the power to go to this Court to seek several differ-

ent remedies, included among which are the equitable remedies—including injunctive relief. Now if this Court has no discretion on these matters, I suggest that the action be on the law side—

The COURT: To what particular section do you refer?

Mr. BROWN: The Housing Act. It is Section 6. No, I mean 206. Section 7 (a), Your Honor, I believe, is the section under which this Court has or had the power to act when this Act was in effect.

43 The Expediter may make application to the appropriate court for an order enjoining such acts or practice or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted, and if granted, shall be granted without bond. Now the Porter and Warner Holding Company case is the case which gives rise to these actions by the Government, saying that a mandatory injunction compelling restitution is another order,—another order which is permitted under that case.

The COURT: Generally used in rent control cases, and the situation there, by analogy, could be where a tenant sought restitution of an overcharge and the landlord proposed as a defense some unusual expense, and while the nature of the remedy may be equitable, it is not an equitable defense, it cannot be. The only issue is whether or not the overcharge was made, and paid, and received, and what circumstances might have induced the landlord to accept the rent is not a matter to be tried.

Mr. BROWN: Well, I can't agree that that is the law, Your Honor.

The COURT: I have always understood it to be. Maybe I am wrong.

Mr. BROWN: Under the price control act, if Your Honor please,—under the rent control act and under Regulation 5 with respect to new housing, there was a restitution penalty specifically provided. The amount of the overcharge was treble or double. Now that is not the type of situation you have before you now, Your Honor, in this particular case. This case is governed by Regulation 33, which provides no civil penalty whatsoever for a violation of the maximum price part of the regulation. Regulation 5, which was issued in August of 1946 does follow the form of the price control and rent control acts. It is the same type of regulation which probably takes the discretion from the Court, and the acts under which that
44 regulation and the other rent regulations were issued specifically provides that penalty. Now in this particular situation you have no statutory authority for restitution at all. You have no regulation which provides for restitution at all. You have merely a law which is general, a regulation which makes prohibition and provides criminal penalty only, and the Government comes

in now without any basis for the relief they ask resting on statute or regulation. They are here in equity, Your Honor.

The COURT: Mr. Branch, why do you sue for injunctive relief rather than for straight judgment or money damages?

Mr. BRANCH: Well, I am somewhat uncertain myself, Your Honor. I think probably the reason being possibly one of bookkeeping,—that the beneficiaries of the action are the buyers of the houses, and the Government seeks restitution for violation of the contract with them for the benefit of the purchasers who are the beneficiaries of the statute, in the first place.

The COURT: Is there some specific proviso that allows for such pleading?

Mr. BRANCH: It has been done quite a while.

The COURT: I mean you have got authority for it?

Mr. BRANCH: Yes, I have.

The COURT: In other matters that have gone up to the Appellate Court they have proceeded the same way?

Mr. BRANCH: Yes, Your Honor.

The COURT: No one has raised any objections to the pleadings?

Mr. BRANCH: Well, none that appeared in the Appellate compilation.

The COURT: So that we will have a good record here and have your rights protected, I am disposed to hold strictly to the language of the statute; and to protect your rights, you can make an offer of proof on what you say you could prove, or wished to prove, and I will rule thereon, and you can protect yourself. I think that is the best way to handle this situation.

45 Mr. BROWN: If Your Honor please: We propose to prove through the witness who is now on the stand and who has prepared himself to testify by making an examination of the premises and making a detailed study of the plans, specifications and blue prints,—we propose to prove through him that in his opinion it would have cost a reasonably competent contractor building these homes in Derry at the time they were built, building the Tasker House or the Buckey house up to the minimum requirements of the specifications themselves, would have reasonably cost—

Mr. BRANCH: I don't know why Mr. Brown should be able to testify to something here that the witness is going to say on the stand.

The COURT: He isn't testifying, he is making an offer of proof.

Mr. BRANCH: As to the cost of the house? All right.

Mr. BROWN: The reasonable cost to a reasonably competent contractor at that time for either house, building the house according to the plans, not including the breezeway or garage, would have been approximately \$12,350; that for a reasonably competent contractor to have built the breezeway and added the garage to either of

those houses, the expectable cost would have been \$13,690; further, that to have built the Tasker house as it was in fact built, with the addition of quality which has been built into that house, that the expectable cost on the Tasker house would be roughly \$15,600. I am sorry, I beg your pardon, Your Honor. That to build the Buckey house with the extra work and materials which are in the house, consisting of the dormer, the second floor, the bulkhead to the basement and stairs for that, that the price of the Buckey house to a reasonably competent contractor would have been about \$15,600; that the cost to a reasonably competent contractor of the Tasker house, with the additions to it, with the Breezeway, the ceramic tile bath room, stairs to the second floor, and the extra quality materials and workmanship, that the expectable cost there would have been \$15,250. Further, Your Honor will realize that the witness 46 would testify, or we would have offered a witness' testimony of the details to support the conclusions I have just stated in the offer.

The COURT: Is that your whole statement, Mr. Brown?

Mr. BROWN: Yes.

The COURT: The offer is rejected.

Mr. BROWN: And may our exception be noted?

Q. Mr. Swanburg, did you at my request investigate any trade publications?

A. Yes.

Q. To determine whether construction costs have increased or decreased during the period from August, 1946 to the first of the year 1948?

A. Yes.

Q. How much was it, Mr. Swanburg?

A. This graph uses 1913 as a base index of a hundred (100), so if we go over to 1946—and this is not entirely accurate,—I mean my plot may be a little bit wrong, you know,—on a graph statement, but we land on a point beginning at '46 of 315. Then by using coordinance again, perhaps the tenth month of '47, we land on 400, indicating an increase in there of 85 points.

Q. And in percentage on the base of 315, approximately how great an increase does that indicate?

A. Well, you would have 25% immediately.

Mr. BROWN: You may inquire.

Cross-examination.

Questions by Mr. BRANCH:

X Q. Did you during that period in 1946 construct any private dwellings?

A. Not whole dwellings, sir, no.

X Q. Partial?

A. Partial.

X Q. Did you have to get, or did you get any priority ratings for them?

A. Yes, I believe we did.

47 X Q. Why?

A. Because it worked out this way: I could not secure lumber from a lumber dealer unless I had a slip of paper from him to present back to his wholesaler, to the broker, to the lumber mill, right down the line, in order to cover the law.

X Q. In other words, it was virtually impossible for you to obtain materials during that period without having been assigned a priority rating number?

A. No, that is not so.

X Q. Or obtaining a priority rating?

A. That is not so.

X Q. What do you mean by what you say?

A. This is three years ago. There were limits set up on private construction; for instance, repairs were allowed so much money and no more. I could, however, buy stock—not all stock—but I could buy some stock without a priority. The only thing this priority did was to give the lumberman a chance to get his lumber replaced, but the only way at the time, without a piece of paper he couldn't get the stock again.

X Q. Then the general practice among the lumber men was to obtain from the buyers some kind of priority rating?

A. It was mandatory, if you paid for what the statute called for. I don't make myself clear.

X Q. Now according to your testimony, the index of costs rose between 1946 and 1947 substantially, is that right?

A. Correct.

X Q. In other words, if a person started a construction job in 1946 and the longer it took him to complete it, the more it would cost him, is that right? during that period?

A. Naturally.

The COURT: Why naturally? You mean the longer it took him to complete it, the more expensive it was?

The WITNESS: Certainly, sir.

The COURT: You mean because the price was rising all the time, is that what you mean?

48 The WITNESS: The prices were rising all the time, Your Honor.

X Q. Mr. Swanburg, do you ever do construction jobs on contract?

A. We do now.

X Q. Did you in '46?

A. No, sir.

X Q. Why not?

A. It was too dangerous.

Mr. BRANCH: All right, that is all.

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Testimony of LIONEL J. DeGRACE. Sworn.

Direct examination:

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Mr. BROWN: We offer to prove through this witness, if the Court please, that from the Modern Building Company account at the Derry Bank the total amount of \$13,927.89 was expended toward the construction of these two houses; that from a second account standing in the name of Crystal Motors, a total of \$9,204.47 were paid on behalf of Modern Building Company toward the construction of these houses, making a total by check disbursements from those two accounts to the date of Mr. DeGrace's report of \$23,132.36; further, that the investigation revealed a total of at least \$1,595.20 in outstanding, unpaid bills incurred in the construction of the buildings. The report further shows cash disbursements by the defendant Fortier in a total amount of \$2,017.77, and taking into account the value of the land, which the testimony would be was taken into the venture and considered in this report to have a value of \$1,000,—from this witness we offer to prove that the total expenditures were not less than \$27,755.33 to the date of the witness' report.

The COURT: The offer is rejected upon the ground that it does not appear to be relevant, and it is immaterial.

Mr. BROWN: And may our exception be noted?

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Mr. BROWN: If the Court please, at this time I would like to offer a certified copy of the decree of the Superior Court of the State of New Hampshire, Rockingham County, in an action No. Equity 6838, entitled *Anthony Marino, et al., v. Robert J. Fortier*, and decree dated February 9, 1949, and entered by John R.

49 Goodnow, Presiding Justice, and I offer the record in that action, Your Honor, for the limited purpose of establishing that "the total monies expended and expenses incurred by the petitioners and the defendant in the construction and sale of the two houses is found to be not less than \$28,301.79, including the \$1,000 value of the land, but excluding all claims of the parties for further compensation for personal services or wages in connection with the construction and sale of the two houses", and if I may add a word of explanation as to why I make this additional offer,—After Mr. DeGrace's report was concluded, there appeared to be further unpaid bills which were taken into account before this decree was entered, thus changing the total amount.

The COURT: You make it in a form of an offer?

Mr. BROWN: Yes.

The COURT: Your offer is rejected.

Mr. BROWN: And may our exception be noted?

Testimony of GEORGE H. BUTTERFIELD. Sworn.

Direct examination:

Mr. BROWN: If the Court please, we offer to prove through this witness that in performing his duties as an appraiser for the Veterans' Administration in conjunction with GI loans, so called, applied for by Capt. Tasker and Major Buckey, that this gentleman appraised the Tasker house for \$11,100, as being its fair value for loan purposes, and that he similarly appraised the Buckey house at that time as having a fair value for loan purposes of \$12,500.

The COURT: The offer is rejected.

Mr. BROWN: And may our exception be noted?

Testimony of JAMES ROYAL KILLKELLEY. Sworn.

Direct examination.

Questions by Mr. BROWN:

Q. Would you state your full name, address and occupation, sir?

50 A. James Royal Killkelley, Wilton, New Hampshire, Loan Department Manager of the Manchester Federal Savings and Loan Association.

Q. Mr. Killkelley, you were at one time an officer or official in the Federal Housing Administration Office in Manchester?

A. That's right.

Q. And what was your position in that Agency in August of 1946, do you recall?

A. August of 1946 I was either Chief Underwriter or Assistant District Director. About the exact time, I am not sure which title it was.

Q. Along that same line, Mr. Killkelley, there were some items that under this regulation in '46 were expressly allocated, isn't that so? Structural steel items and such sort of things?

A. You are getting too technical for my memory. As a matter of fact, we had nothing to do with the allocation part of it.

Q. There is a distinction, is there not, between assigning a contractor an HH rating and allocating any material?

A. That's right.

Q. I mean those are two different things, isn't that so?

A. That's right.

Q. And there were allocations being made by some of the Federal Agencies as well as priorities being given at that time?

A. You are getting a little over my head in this allocation matter, because as I understood it—perhaps somebody here knows more about this than I do. The allocation of material was at the level of the manufacturer; that is, before the wholesaler. We were handling priorities for the consumer. I mean, we were giving him these priorities when he wanted to go out and get something. Now this whole system is something somebody else has to explain, because in our particular outfit, all we did was process the applications from the individuals, because our offices are spread over some sixty-five areas, where there are none of them now, and we were nearer to the local builders, that's all.

51 Testimony of VINCENT MARINO. Sworn.

Direct examination.

Questions by Mr. GREEN:

Q. How old are you, Mr. Marino?

A. Twenty-seven.

Q. And what is your occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. Well, I was a journeyman carpenter at nineteen years old. At that time I had completed two years in college at construction. That is, I completed my course there in Wentworth. I was in charge of maintenance in Maintenance Air Craft School in Boston, with the exception of about four or five months when I enlisted in the United States Naval Seabees. I was with the Seabees for approximately three and a half years at construction work at over seas bases.

Q. And when did you get back?

A. In January of '46, I believe, and it was always my ambition, and also my dad's, to being a carpenter; also, that we go into business ourselves. And as it happened, we started to build these two houses here in Derry, being our first attempt at building homes on our own.

Q. And who did the building there?

A. My dad and myself.

Q. And was Mr. Fortier associated with you?

A. Yes, he handled most of the book work.

Q. Did you do any of the book work yourself?

A. Yes, about three months after we started to build these houses, approximately, I was engaged to wed, and I did get married, and I had been taking care of the books for about that amount of time, until I got married, when I handed them over to Mr. Fortier before I got married and went on my honeymoon.

Q. When you got back from your honeymoon, did you go back to work on these houses?

A. Yes, I did.

Q. And who took care of the books?

A. Mr. Fortier.

Q. And do you have any familiarity with any of the finances after you came back from your honeymoon?

A. No, I didn't.

Q. Were these the first houses you built?

52 A. On our own, yes. I, however, had worked with other contractors in putting up houses prior to those.

Q. For how long did you work on these houses?

A. Well, we worked on these houses—I don't remember the exact amount of time that we were on them, but I do remember the fact, that I worked for quite a period of time without being able to get any salary; in fact, I just kept putting more money into them in order to continue the work and to try to get them completed, until there was a period in there where I just couldn't keep on going, I had just been married, and I had to try to support a home, so both I and my dad left the work to get work elsewhere in order to make a week's living.

Q. And under whose control were the houses left when you two left?

A. Mr. Fortier.

Q. That is, he was to take care of them after that?

A. That's right.

Q. Now while you were working—well, do you know approximately when that was that you left?

A. I don't remember.

Q. Well, how long would you say you worked at it?

A. A year and a half.

Q. Now did you apply for any priorities for these houses?

A. Well, we did receive one, but it was very, very seldom that I was asked for a priority number at any place that I went to buy materials.

Q. You mean you could go and buy materials without the use of the number?

A. Yes, very often, sir, places where we would go to buy materials didn't even ask us for a number.

Q. Well, referring back to the time when you applied for the number, did you go to the F.H.A. office?

A. I believe Mr. Fortier and I were there together, yes.

Q. And did you have some discussions with the men in the office?

A. Yes, we did.

Q. And did you get this priority rating?

A. Well, that was automatic, with the filing of the specifications, that was handed to us. I mean it wasn't a separate application that we had to go after.

53 Q. And on the authorization that you received in regard to these houses, when you finally received it, was it your understanding that there was or was not a garage connected with the house?

A. That there was not a garage.

Mr. BRANCH: I object.

The COURT: His knowledge, not his understanding.

Q. Well, what was your knowledge as to whether or not there was to be a garage attached to the house?

A. There was not to be a garage when we started.

Q. Now while you were working on these houses, did any inspectors from the FHA or any other Government Agency come by?

A. Yes, quite frequently. I would say at least every other week or every third week.

Q. Do you recall who they were?

A. Mr. Baker was down several times and I believe Mr. Chesley was there, also; Mr. Jones was, also, a frequent caller. That was from the Federal Savings Bank.

Q. And did they inspect the work you were doing?

A. Yes, at all times, they even commended us as to the fine job we were doing.

Q. Did any of them ever complain about the work you were doing?

A. No, sir.

Q. Did they ever complain as to what you were building?

A. No, sir.

Q. Did any of them ever tell you about any of these regulations?

A. None of them mentioned any—

Mr. BRANCH: I object to this.

The COURT: Were they bound to, Mr. Green?

Mr. GREEN: Well, perhaps not. You may inquire.

Cross-examination.

Questions by Mr. BRANCH:

X-Q: Mr. Marino, when did your construction on these two houses start?

A. I believe it was some time in July.

X-Q. July of '46?

A. Yes.

X-Q. Did you ever use your priority rating number or your priority number to obtain material for these houses?

54 A. Just as I have stated. The only times that I can recall was at Mr. Sundeen's.

X-Q. You did use it then?

A. Well, as I said, some of them would ask us for it and he was one of the parties that did.

X-Q. And others did, too?

A. Well, not that I recall. I say there were occasions where some of them would ask for it. But none other that I recall having asked me for it.

X-Q. Except that you know that there were other cases. In other words, you don't know the names of the particular concerns?

A. No. We knew for a fact that some lumber dealers required the number of this priority assistance, and others didn't.

The COURT: Well, did some of them?

The WITNESS: No.

The COURT: You mean to say that you built the houses and the only request that you had for priorities was for four windows?

The WITNESS: Well, some of the different lumber concerns didn't request us for this number, sir.

The COURT: He is asking you, did any.

The WITNESS: Mr. Sundeen.

X-Q. Did anyone else?

A. No, sir.

X-Q. You never used the priority number that you obtained with any other supplier of material?

A. Not that I recall.

X-Q. But you did with Mr. Sundeen?

A. Yes, sir.

X-Q. Referring to Plaintiff's Exhibit No. 4, Mr. Marino, you had nothing to do with the preparation of that?

A. Yes, this on the back is mine, the printing.

X-Q. This is your work here on the back page?

A. Yes.

X-Q. And referring to item No. 29 of this Exhibit, you printed in something concerning a garage, did you?

A. That's right. At the time we were there at the office of the FHA, it wasn't known as to whether or not they would allow us to build a garage. However, Mr. Chesley asked me to fill it in, anyway.

55 Mr. BRANCH: I believe that is all.

The COURT: Anything further?

Mr. GREEN: No, that is all.

Testimony of ROBERT J. FORTIER. Sworn.

Direct examination.

Questions by Mr. BROWN:

Q. Will you state your name, residence and occupation, Mr. Fortier?

A. Robert J. Fortier; Crystal Avenue, Derry, New Hampshire; occupation, salesman.

Q. What are you selling?

A. Automobiles.

Q. Sell anything else besides automobiles, Mr. Fortier?

A. Not at this time.

Q. You are one of the defendants in this action?

A. That's right, sir.

Q. What were you doing in the summer of 1946 for a living?

A. Selling some real estate and used cars.

Q. And why were you selling real estate at that time?

A. To get a living.

Q. What had happened to the automobile business?

A. Well, there wasn't cars enough, really, so that we had any to sell.

Q. Let me ask you, sir, how old are you?

A. Fifty-one.

Q. Are you a veteran of this last war?

A. No, sir. The First War.

Q. The First War?

A. That's right, sir.

Q. And where did you serve during the First War, what unit?

A. 426 Field Signal.

Q. That is an army organization?

A. That's right, sir.

Q. Now at some time in the spring or summer of 1946, did young Vincent Marino and his dad come to see you about building some houses?

A. That's right, sir.

Q. As the result of conversations and discussions with the Marinos, did you enter into some kind of a joint venture with them?

A. That's right, sir.

Q. And under what name or designation did that venture go?

A. Under the Modern Building Company.

56 Q. And how long did that Modern Building Company, so called, last?

A. It went until such a time as we disposed of the houses.

Q. Now you came up to Manchester, you and Vincent Marino, did you, when he applied for authority to build the houses?

A. I did, sir.

Q. Who filled out the specifications and the applications that were filed?

A. Mr. Marino.

Q. And when you came up to the office up there, were these papers made out when you came in, or did you make them out there, or what, if you remember?

A. I don't think I can tell, sir.

Q. Well, let me ask—you have been sitting here in court throughout the trial?

A. Yes.

Q. When you left the Federal Housing Authority office in Manchester, after processing your application, what was the situation as you understood it with respect to whether or not a garage was to be built under that approval?

A. I understood, we were told we could not build one.

Q. Now it is a fact, is it not, Mr. Fortier, as the houses were built and as they were completed, garages and breezeways were built attached to both houses?

A. That's right, sir.

Q. And the house that we have been calling the Buckey house was finished off with three rooms upstairs?

A. That's right, sir.

Q. And an additional entry, door and staircase to the basement was built on the Buckey house?

A. That's right.

Q. And in the so-called Tasker house, a staircase to the attic was finished?

A. Yes, sir.

Q. And there were some other changes and additions with respect to the houses, were there?

A. Yes, there were, sir.

Q. Now who handled the books of account down there after Vincent Marino was married?

A. I did most of the time.

Q. And who handled the check books after that?

A. I did. I think so, sir.

Q. Let me ask you this, sir: How did you finance the construction of these buildings?

57 A. Partly by a loan from the Manchester Federal Savings Bank and the rest by borrowing here and there, and by a mortgage on a piece of property I had.

Q. What was your prior experience in the contracting game?

A. None, sir.

Q. What has been your experience since?

A. None.

Q. Did you come to the conclusion at some time that too much money was going into the construction of these houses?

A. I knew we were definitely losing money. It was a scramble to be able to even finish.

Q. When to the best of your recollection did you first realize that you were not going to come out of this venture whole?

A. I should think sometime in '47.

Q. Well, do you recall when you got to the point—let me ask you this: On this arrangement with Vincent Marino and Anthony Marino, were they to be paid anything for their labor?

A. They drew their salary right along until such time as I ran out of money.

Q. Now, you say they received that how long, or until when?

A. Until such time as I run out of money,—there wasn't any money.

Q. Do you recall about when it was that you ran out of money?

A. It seems to me it was around July of '48.

Q. Let me ask you this, sir: did you and Vincent Marino arrange to sell the Tasker house to Vincent Marino at some time?

A. That's right, sir.

Q. Do you remember when that was?

A. I don't know. I think that was in the fall, around December.

Q. Well, it was before Capt. Tasker bought the house?

A. Definitely, definitely; that was to reimburse us, so as to get some money to go on.

Q. Well, Capt. Tasker bought his house in July or August of '47?

A. Yes, sir.

Q. So that it was before that?

A. That's right, sir.

Q. And why do you say there was this interim sale to Vincent Marino?

A. So that we could try and finish that second house.

58 Q. Trying to get some money to finish it?

A. That's right.

Q. Now then, the money that you got from that sale went into the completion of the other house?

A. That's right.

Q. Now were you able to complete the second house with the proceeds of your original loan and what you got on that sale?

Mr. BRANCH: I object.

The WITNESS: No, sir.

The COURT: It doesn't make any difference, does it?

Mr. BRANCH: I don't see as it makes any difference.

The COURT: It doesn't make any difference, does it, Mr. Brown?

Mr. BROWN: Under Your Honor's previous rulings, I assume the offer is to be excluded; I would like to have the record appear that that is so.

The COURT: If you would like to make an offer, you can.

Mr. BROWN: I would like to offer through this witness that the proceeds of the original construction loan plus the proceeds of an intermediate sale of the Tasker house to the defendant, Vincent Marino,—that the proceeds from those two sources were insufficient, and that the defendant Fortier in fact did raise additional money to permit the completion of the two houses through mortgaging other property which he owned and through the sale of automobile chattels which he owned.

The COURT: The offer is rejected.

Mr. BROWN: And our exception is noted, if the Court please?

Mr. BROWN: I would like to offer to show through this witness, Your Honor, that he suffered a financial loss of some eleven or \$1200, in addition to the time, labor and effort that he put into the construction of the two houses, and that similar losses were sustained by the other two defendants.

The COURT: Well, the offer is rejected.

Mr. BROWN: And our exception is noted, please?

Mr. GREENE: And the same for us.

The COURT: Yes.

59 Q. Mr. Green has reminded me of this one other thing.

There was a period, was there not, Mr. Fortier, during which the two Marinos worked and there was no money to pay them, and they have not been paid for that labor?

A. That's true, sir.

Cross-examination:

X Q. Your activity in the Modern Building Company was by and large the bookkeeping and the book work end, is that right?

A. No, I worked along and done what I could, put in my time.

X Q. Well, what else did you do?

A. Chasing material.

X Q. Oh, you did?

A. Yes.

X Q. In other words, you helped to obtain the materials which were to go into those two houses?

A. Yes, sir.

X Q. Did you ever use your priority rating number to obtain it?

A. Never that I know of, sir.

X Q. Your best recollection is that you never used the priority rating number attached or included on the Outline Specification and, on the application for priority assistance to assist in obtaining material?

A. That is the best of my recollection, sir.

The COURT: Evidence Closed.

Mr. BROWN: At this time may we renew our motion to dismiss, and likewise renew our motion to abate, which has been previously made? We make this same motion at this time, and for the reasons that we have previously discussed.

The COURT: Your motions are denied in both instances.

Mr. BROWN: May our exception be noted?

The COURT: Yes. The record will disclose that you have made them, with a notation by me,—the record is clear,—that the motions were made both at the close of the Plaintiff's case and at the close of all the evidence.

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In United States District Court

LIST OF EXHIBITS

Plaintiff's Nos.:

1. 3 Ledger Sheets, Modern Building Company, Vincent D. Marino or Robert J. Fortier—Derry, N. H.
2. Signature card, Modern Building Company, First National Bank, Derry—N. H. Vincent D. Marino—Robert J. Fortier.
3. Application for priority assistance dated August 21, 1946, signed by Vincent D. Marino.
4. Outline Specifications dated August 21, 1946, signed Modern Building Co., R. J. Fortier.
5. Blue prints of plans of Houses in question.
6. Report of Architectural Examiner, W. H. Baker.
7. Priorities Processing Report, signed by Charles H. Chesley, dated Sept. 9, 1946.
8. Sales slip, Sundeen Lumber Co. to Modern Building Co. dated 12/10/46, Amount \$18.00.

Defendants':

- A. Folder containing checks and statements for identification.
- B. Statements and checks of Crystal Motor account, for identification.
- C. Statement signed by Deane C. Tasker, Dated 29. June, 1948, Produced by Plaintiff, for identification.

In United States District Court

MOTION OF DEFENDANTS VINCENT D. MARINO AND ANTONIO MARINO TO ABATE, AND ORDER OF COURT THEREON

(Filed and Denied September 28, 1949)

Now come the defendants Vincent D. Marino and Antonio Marino and by their counsel move the Court that the above entitled action be abated, for the following reason:

1. For lack of a proper party or parties plaintiff. The party plaintiff of record has no interest in the proceedings; and the

50 UNITED STATES OF AMERICA VS. ROBERT FORTIER, ET AL.

61 real parties in interest are not parties of record. No authority lies in the Attorney General's office to conduct, initiate, or maintain this action.

Dated September 28, 1949.

MEYER GREEN,
Attorney for VINCENT D. MARINO and
ANTONIO MARINO,
Defendants.

September 28, 1949.

Motion denied.

Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

In United States District Court

MOTION OF DEFENDANT ROBERT FORTIER TO ABATE, AND ORDER OF
COURT THEREON—Filed and Denied September 28, 1949

Now comes the defendant Robert Fortier and by his counsel moves the Court that the above entitled action be abated, for the following reason:

1. For lack of a proper party or parties plaintiff. The party plaintiff of record has no interest in the proceedings, and the real parties in interest are not parties of record. No authority lies in the Attorney General's office to conduct, initiate, or maintain this action.

Dated September 28, 1949.

STANLEY M. BROWN,
Attorney for ROBERT J. FORTIER,
Defendant.

September 28, 1949.

Motion denied.

Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

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In United States District Court

MOTION OF DEFENDANTS VINCENT D. MARINO AND ANTONIO MARINO
TO DISMISS COMPLAINT, AND ORDER OF COURT THEREON—Filed
and Denied September 29, 1949

Now come the defendants Vincent D. Marino and Antonio Marino in the above entitled cause, by their attorney, and move the Court that the complaint be dismissed, for the following reasons:

1. Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. Sec. 631 et seq.), referred to in paragraph 2 of the complaint, was expressly repealed by Laws of 80th Congress, Chapter 29, Public Law 29, in Section 3 thereof, said repeal taking effect for all purposes material to this action on, to wit, March 31, 1947.

2. The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.), referred to in paragraphs 1, 3 and 4 of the complaint, was expressly repealed in all respects material to this action by Laws of the 80th Congress, Chapter 163, Public Law 129 (Housing and Rent Act of 1947), and sections 4, 5, and 7 were thus repealed as of June 30, 1947. By operation of the repeal of Section 1 of the Veterans' Emergency Housing Act by Section 1 of the Housing and Rent Act of 1947 "all regulations and orders issued thereunder" terminated and were null and void on and after June 30, 1947.

3. As the result of the above-mentioned legislation Regulation 33 was not in effect after June 30, 1947 insofar as it relates to Maximum sales prices, and there was no maximum sales price in effect on November 12, 1947 when the Buckeye house was sold as alleged in paragraph 9 of the complaint, nor on December 4, 1947 when the Tasker house was sold as alleged in paragraph 10 of the complaint.

WHEREFORE, the purpose of this action as set forth in paragraph 4 of the complaint being illusory, and the acts complained of not being violative of law or regulations, the defendants Vincent D. Marino and Antonio Marino move that the complaint be dismissed, and for their costs.

Dated September 28, 1949.

MEYER GREEN,
Attorney for Those Two Defendants.

September 29, 1949.

Motion denied.

Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

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In United States District Court

MOTION OF DEFENDANT ROBERT FORTIER TO DISMISS COMPLAINT,
AND ORDER OF COURT THEREON—Filed and Denied September 29,
1949

Now comes the defendant Robert Fortier in the above entitled cause, by his attorney, and moves the Court that the complaint be dismissed, for the following reasons:

1. Title III of the Second War Powers Act, as amended (56 Stat. 176, 50 U.S.C.A. App. Sec. 631 et seq.), referred to in paragraph 2 of the complaint, was expressly repealed by Laws of 80th Congress, Chapter 29, Public Law 29, in Section 3 thereof, said repeal taking effect for all purposes material to this action on, to wit, March 31, 1947.

2. The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.), referred to in paragraphs 1, 3, and 4 of the complaint, was expressly repealed in all respects material to this action by Laws of the 80th Congress, Chapter 163, Public Law 129 (Housing and Rent Act of 1947), and sections 4, 5, and 7 were thus repealed as of June 30, 1947. By operation of the repeal of Section 1 of the Veterans' Emergency Housing Act by Section 1 of the Housing and Rent Act of 1947 "all regulations and orders issued thereunder" terminated and were null and void on and after June 30, 1947.

64 3. As the result of the above-mentioned legislation Regulation 33 was not in effect after June 30, 1947 insofar as it relates to Maximum sales prices, and there was no maximum sales price in effect on November 12, 1947 when the Buckey house was sold as alleged in paragraph 9 of the complaint, nor on December 4, 1947 when the Tasker house was sold as alleged in paragraph 10 of the complaint.

WHEREFORE, the purpose of this action as set forth in paragraph 4 of the complaint being illusory, and the acts complained of not being violative of law or regulations, the defendant Fortier moves that the complaint be dismissed, and for his costs.

Dated September 28, 1949.

STANLEY M. BROWN,
Attorney for ROBERT J. FORTIER,
Defendant.

September 29, 1949.

Motion denied.

Defendant excepts.

ALOYSIUS J. CONNOR,
U. S. District Judge.

In United States District Court

DEFENDANTS' DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON
APPEAL—Filed July 1, 1950

Robert Fortier, Vincent D. Marino and Antonio Marino, d/b/a Modern Building Company, appellees, hereby designate the following additional portions of the record, proceedings, and evidence to be contained in the record on appeal from the judgment entered in the above-entitled action:

1. The material portions of the transcript of the evidence introduced in the District Court as marked at pages 4-5, 6, 9-10, 12-15, 33, 41-44, 112, 117, 121-131, 132-133, 137, 138-139, 139-140, 141, 142-143, 147, 155-158, 160-163, 163-166, 167, 169, it being agreed that the appellant shall file an amended Condensed Statement of Testimony and print in addition thereto question and answer testimony as marked at transcript pages 45-52, 99, 133-135, 158-159.
2. Motion of defendants Vincent D. Marino and Antonio Marino to abate complaint.
3. Motion of defendant Robert Fortier to abate complaint.
4. Motion of defendants Vincent D. Marino and Antonio Marino to dismiss the complaint.
5. Motion of defendant Robert Fortier to dismiss the complaint.
6. This designation.

ROBERT FORTIER,
By McLANE, DAVIS, CARLETON & GRAF,
By STANLEY M. BROWN,

Attorneys for Defendant ROBERT FORTIER,
VINCENT D. MARINO and
ANTONIO MARINO,

By GREEN, GREEN and ROMPREY,
By SAMUEL GREEN,

Attorneys for Defendants VINCENT D. MARINO and
ANTONIO MARINO.

(Memorandum: Order of enlargement of time for filing record on appeal to and including July 21, 1950, is here omitted.)

66-68 Clerk's Certificate to foregoing transcript omitted in printing.

54 UNITED STATES OF AMERICA VS. ROBERT FORTIER, ET AL.

69 United States Court of Appeals for the First Circuit, October
Term, 1950

No. 4521

UNITED STATES OF AMERICA, PLAINTIFF, APPELLANT

v.

ROBERT FORTIER ET AL., DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF NEW HAMPSHIRE

[89 F. Supp. 708]

Before MAGRUDER, *Chief Judge*, and WOODBURY and FAHY, *Circuit
Judges*

Robert D. Branch, Assistant U. S. Attorney, with whom John J.
Sheehan, United States Attorney, was on brief, for appellant.

Stanley M. Brown, with whom Meyer Green, McLane, Davis,
Carlleton & Graf, and Green, Green, Romprey & Sullivan were on
brief, for appellees.

OPINION—December 12, 1950

MAGRUDER, *Chief Judge*:

On November 9, 1948, the United States filed its complaint in the
court below under § 7(c) of the Veterans' Emergency Housing Act of
1946 (60 Stat. 207) against the defendants, doing business in part-
nership under the name Modern Building Company. Relief was
sought by way of mandatory injunction requiring the de-
70 fendants to make restitution to two veterans, who had pur-
chased houses constructed by the defendants, of sums which
they had paid for said houses in excess of the maximum sales prices
set forth in defendants' approved application for priorities assist-
ance under Priorities Regulation 33 (11 F.R. 4085). The district
court gave judgment for the defendants, and the United States
appealed.

Priorities Regulation 33 was issued by Civilian Production Ad-
ministration pursuant to the provisions of Title III of the Second
War Powers Act, as amended (56 Stat. 176), and executive orders
thereunder.* Subsequently, by Housing Expediter Priorities Order

* So far as Priorities Regulation 33 rested upon the statutory
basis of Title III of the Second War Powers Act, that basis was
eliminated by the expiration of said Title III on March 31, 1947,
by force of Section 3 of the First Decontrol Act of 1947 (61 Stat. 34).

5 (12 F.R. 2111), the Housing Expediter took over and adopted Priorities Regulation 33 as his own regulation under the regulatory power conferred upon him by § 4 of the Veterans' Emergency Housing Act of 1946.

The defendants, on August 21, 1946, made application for a residential construction permit under Priorities Regulation 33. Upon approval of the application on September 9, 1946, defendants were authorized to construct two five-room houses in accordance with detailed specifications. A project serial number was assigned, and an HH preference rating was issued to the defendants; also, a maximum sales price of \$8,350 was established for each house. At this time the building materials which were to be purchased with the priorities assistance were all under price control. But by Supplementary Order 193, issued by the Price Administrator November 12, 1946, price controls were lifted from all such commodities (11 F.R. 13464). It does not appear that the defendants had made use of

71 their preference rating to obtain any substantial amount of building materials prior to the lifting of price control. Indeed, the record is lacking any clear indication that the defendants had any substantial benefit from their preference rating in the obtaining of building materials. Apparently such preference ratings which had not been used prior to March 31, 1947, ceased to be of value after that date. See testimony by the Housing Expediter, Hearings before the Committee on Banking and Currency, House of Representatives, 80th Cong., 1st Sess., 1947, on H.R. 2547, at p. 55.

One of the houses, which was completed in August, 1947, was sold on December 4, 1947, for the price of \$12,000. The other house was not completed until January, 1948, but it had been sold by the defendants, prior to completion, on November 12, 1947, for \$12,800. The defendants offered to prove, through the testimony of an appraiser for the Veterans' Administration, that, in performance of his duties in conjunction with G.I. loans, he had appraised the first house as being of fair value of \$11,100 for loan purposes, and the second of the fair value of \$12,500 for loan purposes. This offer of proof was rejected by the court.

Section 944.54(g) of Priorities Regulation 33 forbade any person to sell a dwelling house built under said regulation for more than the approved maximum sales price; such restriction, the regulation stated, "must be observed so long as this regulation remains in effect." (Section 1(b) of the Veterans' Emergency Housing Act of 1946 provided that the Act, "and all regulations and orders issued thereunder, shall terminate on December 31, 1947, or upon the date specified in a concurrent resolution by the two Houses of Congress, declaring that the provisions of the Act are no longer necessary to deal with the existing national emergency, whichever date is the

earlier." Section 5 of the Veterans' Emergency Housing Act provided (60 Stat. 210):

72 "It shall be unlawful for any person to effect, either as principal or broker, a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act, or to solicit or attempt, offer, or agree to make any such sale. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act. Notwithstanding any termination of this Act as contemplated in section 1(b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to rights or liabilities incurred or offenses committed prior to such termination date, for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Section 7 of the same Act contained various provisions for criminal and civil enforcement.

As it happened, the Veterans' Emergency Housing Act of 1946 was not terminated in either of the two ways contemplated in § 1(b) of that Act, above quoted. Rather, such Act, or the part thereof here involved, was repealed on June 30, 1947, by the Housing and Rent Act of 1947, § 1(a) of which provided (61 Stat. 193):

"Sections 1, 2(b) through 9, and sections 11 and 12, of Public Law 388, Seventy-ninth Congress, are hereby repealed, and any funds made available under said sections of said Act not expended or committed prior to the enactment of this Act are hereby returned to the Treasury: *Provided*, That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued, under the authority contained in said Act, and before the date of enactment of this Act, with re-

73 spect to veterans of World War II, their immediate families, and others, shall remain in full force and effect."

It seems clear that the United States cannot base its present suit upon the last sentence of § 5 of the Veterans' Emergency Housing Act, which was thus repealed outright on June 30, 1947, prior to the sales of the houses now in question. True, the repealing section, § 1(a) of the Housing and Rent Act of 1947, contained a proviso keeping in effect certain priorities theretofore granted for the delivery of housing materials. But the language of the proviso does not aptly express an intention by Congress to keep in effect the

maximum selling price restrictions of Priorities Regulation 33, as applied to *future* sales of houses built under residential construction permits approved prior to June 30, 1947. The legislative history of the proviso is somewhat obscure and inconclusive. Apparently what Congress had in mind is indicated in the report of the House Committee on Banking and Currency on S. 2182 which became the Housing and Rent Act of 1948. This report stated (H. R. Rep. No. 1560, 80th Cong., 2d Sess.):

"The Housing and Rent Act of 1947 protected any allocation made or committed or priorities granted for building materials to veterans of World War II or their families under Public Law 388, of the Seventy-ninth Congress. This protection was continued in effect in this bill to honor any such commitments which might still exist."

Having repealed the Veterans' Emergency Housing Act of 1946, it is significant that Congress addressed itself specifically to the problem of veterans' housing in the Housing and Rent Act of 1947. Thus in § 4(a)(1) of that Act it was provided that no single family dwelling house, "the construction of which is completed after the date of the enactment of this title and prior to March 1, 1948, shall be sold or offered for sale, prior to the expiration of thirty days after construction is completed, for occupancy by persons other than" veterans of World War II or their families, and in § 4(a)(3) it was provided that no such dwelling house "shall be sold or offered for sale to any person at a price less than the price for which it is offered to veterans or their families". If Congress had further intended to keep in force for the future any maximum selling prices which had theretofore been imposed under Priorities Regulation 33, it would have been natural to express such intent in the proviso to § 1(a) which repealed the Veterans' Emergency Housing Act of 1946, the statutory basis for Priorities Regulation 33.

The United States puts much reliance upon the Act of March 22, 1944 (58 Stat. 118), amending R.S. § 13 to read as follows (as now found in 1 U.S.C. § 109):

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still re-

maining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Since § 1(a) of the Housing and Rent Act of 1947 did not expressly provide that the repeal of the Veterans' Emergency Housing Act of 1946 should have the effect of releasing or extinguishing any "penalty, forfeiture, or liability incurred" under such Act and Priorities Regulation 33 thereunder, we take it that, by virtue of the provision of 1 U.S.C. § 109 above quoted, the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33 thereunder must be treated as still remaining in force for the purpose of sustaining any proper action for the enforcement of any "penalty, forfeiture, or liability" incurred by the defendants thereunder prior to June 30, 1947, when the Act was repealed. But that is of no help to the United States in the case at bar, for here the sales of the two houses did not take place until after June 30, 1947, and therefore the defendants as of that date had not incurred any "liability" to make any restitution of a portion of the purchase price paid by the purchasers of the two houses. The obligation of the defendants to observe a maximum sales price of \$8,350 in the sale of the two houses in question was in no proper sense of a contractual nature, but resulted by imposition of law under § 4 of the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33 thereunder. That contingent obligation necessarily lapsed with the repeal of the Act and the regulation; indeed, as above stated, § 944.54(g) of Priorities Regulation 33 expressly provided that such maximum price restriction "must be observed so long as this regulation remains in effect." In this respect, price regulation on the sale of houses under the Veterans' Emergency Housing Act of 1946 was no different from price regulation under the Emergency Price Control Act of 1942, as amended. When the latter Act terminated on June 30, 1947, there was of course no further obligation to observe price ceilings in the future sale of commodities, although under § 1(b) of the Price Control Act, "as to offenses committed, or rights or liabilities incurred, prior to such termination date," the provisions of the Act and the regulations thereunder "shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." (56 Stat. 24.)

United States v. Carter, 171 F. 2d 530 (C.A. 5th, 1948), is distinguishable, for there the government was allowed to maintain an action "to secure restitution of overcharges that had been made while the 1946 Act was in full effect." Other cases, in so far as they tend against the conclusion we have reached, are to us unpersuasive in their reasoning. See *United States v. Tyler Corp.*, 90 F. Supp. 395

(D.C.E.D.Va. 1949); *Rheinberger v. Reiling*, 89 F. Supp. 598 (D.C. D.Minn. 1950); *Pruitt v. Litman*, 89 F. Supp. 705 (D.C.E.D.Pa. 1949); *Katz v. Litman*, 89 F. Supp. 706 (D.C.E.D.Pa. 1949).

The judgment of the District Court is affirmed.

WOODBURY, *Circuit Judge*, (concurring). I entirely agree. All I care to add is that I entertain grave doubt with respect to the standing of the United States under § 7(c) of the Act of 1946, or even of the Expediter, or his successor, to bring suits for restitution, particularly within the year given to buyers by § 7(d) of the Act to do so on their own behalf.

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In United States Court of Appeals

JUDGMENT—December 12, 1950

This cause came on to be heard on the transcript of record of the District Court of the United States for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S.) ROGER A. STINCHFIELD,

Clerk.

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Clerk's Certificate to foregoing record omitted in printing.

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Supreme Court of the United States, October Term, 1950

No. 602

ORDER ALLOWING CERTIORARI—Filed May 7, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.